

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 EUGENE DIVISION

4
5 UNITED STATES OF AMERICA,)
6 Plaintiffs,) No. 06:12-cr-00578-HU
7 vs.)
8 RICHARD L. OBERDORFER,) ORDER ON MOTION TO DISMISS
9 Defendant.)
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11

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23 HUBEL, United States Magistrate Judge:

24 In a single-count Information filed October 31, 2012, the
25 Government charges that the defendant Richard L. Oberdorfer
26 "constructed and maintained a structure and placed communications
27 equipment on Forest Service land without authorization, all in
28 violation of [36 C.F.R. §] 261.10(a)." Dkt. #1. The Information

1 - ORDER ON MOTION TO DISMISS

1 expressly limits the time frame of the alleged conduct to the
2 period "[f]rom August 28, 2012, through September 8, 2012." *Id.*

3 The code section Oberdorfer allegedly violated prohibits:

4 Constructing, placing, or maintaining any kind
5 of road, trail, structure, fence, enclosure,
6 communication equipment, significant surface
7 disturbance, or other improvement on National
8 Forest System lands or facilities without a
9 special-use authorization, contract, or
10 approved operating plan when such authoriza-
11 tion is required.

12 36 C.F.R. § 261.10(a).

13 The case came on for trial before the undersigned on Friday,
14 March 8, 2013. At that time, Oberdorfer made an oral motion to
15 dismiss the case on double jeopardy grounds. The court continued
16 the trial, and directed the parties to brief the double jeopardy
17 issue. The parties have done so, see Dkt. ## 30, 32, 33, 34 & 35,
18 and the court heard oral argument on the motion on April 19, 2013.
19 Having considered the parties arguments and authorities, I now **deny**
20 Oberdorfer's motion to dismiss for the reasons discussed below.

21 ***DISCUSSION***

22 There has been substantial civil litigation between the
23 Government and Oberdorfer's company, Western Radio Services, Inc.
24 ("WRS"), for several years, all relating to WRS's activities. WRS
25 has communications leases with the National Forest Service for the
26 operation of numerous communications towers on National Forest
27 System lands. These facilities include a communications tower on
28 Walker Mountain in the Deschutes National Forest. In the fall of
29 2010, WRS constructed a second tower and made other modifications
30 to its facilities at the Walker Mountain site. Those activities

1 led the Government to file a civil action against WRS, claiming,
2 *inter alia*, that the second tower and other improvements were not
3 authorized, and WRS's actions constituted trespass. *See United*
4 *States v. Western Radio Services Co.*, No. 03:11-cv-00638-SI (the
5 "civil case").

6 On May 23, 2012, the Government filed a motion for partial
7 summary judgment in the civil case, on its claim of trespass. Dkt.
8 #94 in the civil case. On June 29, 2012, the Government filed a
9 second motion for partial summary judgment, this one on its claim
10 for breach of contract. Dkt. #108 in the civil case. On
11 August 29, 2012, Judge Michael Simon issued an Opinion and Order in
12 the civil case, granting both of the Government's motions for
13 summary judgment on the issue of liability, and also granting the
14 Government's oral motion, made at oral argument, to dismiss its
15 claim of negligence *per se*. Dkt. #148 in the civil case. Among
16 other things, Judge Simon found WRS had "breached two provisions of
17 the parties' lease by not obtaining formal authorization for the
18 new construction and by not submitting detailed construction plans
19 before starting construction." *Id.*, p. 5; *see id.*, pp. 5-10. On
20 the trespass issue, Judge Simon found WRS's failure to obtain
21 formal authorization before proceeding to build the second tower
22 and make other modifications to the Walker Mountain site "exceeded
23 the Forest Service's consent to use of the land and constitute[d]
24 trespass." *Id.*, p. 11.

25 The present criminal action relates to Oberdorfer's activities
26 on the Walker Mountain site for the time period from August 28
27 through September 8, 2012. The Government claims that four days
28 after attending oral argument on its motions for summary judgment

1 in the civil case, "Oberdorfer personally continued construction
2 and placed communications equipment on the unauthorized tower" on
3 Walker Mountain. Dkt. #19, p. 3. The Government further claims
4 that "[d]ays after entry of summary judgment for the United States
5 on both trespass and breach of lease [in the civil case], defendant
6 Oberdorfer placed more communications equipment on the unauthorized
7 tower." *Id.*, pp. 3-4. The Government asserts, "It is this
8 activity that is the subject of this prosecution." *Id.*, p. 4.

9 The issue of appropriate remedies is still outstanding in the
10 civil case. The Government has asked Judge Simon to award costs
11 under the lease agreement in the amount of \$22,214.64, representing
12 "personnel time and costs, plus additional time and costs addres-
13 sing other proposed projects complicated by Western Radio's
14 actions." Dkt. #207 in the civil case, p. 5. In addition, the
15 Government has asked Judge Simon to require WRS to post a \$65,000
16 bond to ensure removal of the tower. See Dkt. #30, p. 6 & n.2;
17 Dkt. #32, p. 8.

18 The crux of Oberdorfer's motion to dismiss is his contention
19 that the monetary damages sought by the Government in the civil
20 case are not simply "damages"; they are, in fact, "punitive in
21 purpose and result," intended to "punish Mr. Oberdorfer." Dkt.
22 #30, pp. 5, 6. Oberdorfer claims he and WRS are virtually the
23 same, noting he is the sole owner of WRS's assets, and, "[a]s one
24 and the same, they are the very definition of privity." Dkt. #33,
25 p. 6. At oral argument, Oberdorfer argued his actions underlying
26 the Information are part of one continuous stream of events which
27 is already the subject of the civil case. He theorizes that
28 because the civil case is punitive in purpose and effect, it

1 therefore is criminal in nature, barring separate prosecution for
2 the same conduct. See Dkt. #30, pp. 4-5. He further argues, at
3 some length, that the Government cannot show it has suffered any
4 actual harm from erection of the new communications tower, which
5 Oberdorfer claims he erected "to prevent the collapse of his
6 previous tower, similar in make, model, and construction to [a
7 different] Forest Service tower that had recently collapsed under
8 the weight of whether [sic] and ice." *Id.*, p. 4. He reasons that
9 because the Government cannot show any actual harm it has suffered,
10 the actual purpose of the civil case must be to punish him, rather
11 than to obtain an actual remedial outcome. Oberdorfer maintains
12 that removal of the new communications tower would be prohibitively
13 expensive as well as hazardous. He claims the statutory scheme is
14 "'so punitive either in purpose or effect as to transform what was
15 clearly intended as a civil remedy into a criminal penalty.'" *Id.*
16 (quoting *United States v. Reveles*, 660 F.3d 1138, 1140 (9th Cir.
17 2011), in turn quoting *Hudson v. United States*, 522 U.S. 93, 99,
18 118 S. Ct. 488, 493, 139 L. Ed. 2d 450 (1997)).

19 Oberdorfer's novel argument is not supported by the law or the
20 facts. We begin with the purpose of the Fifth Amendment's prohibi-
21 tion against double jeopardy, which "'protects against being
22 punished twice for a single criminal offense.'" *United States v.*
23 *Brooks*, 610 F.3d 1186, 1194 (9th Cir. 2010) (quoting *United States*
24 *v. Davenport*, 519 F.3d 940, 943 (9th Cir. 2008)). In the case
25 where "the same act constitutes a violation of two different
26 statutes, the test to determine whether punishment for both
27 offenses may be imposed is whether each provision requires proof of
28 a fact which the other does not. . . . The elements of the

1 offenses are determinative, even if there is a substantial overlap
2 in their proof.” *Id.* (internal quotation marks, citations
3 omitted). The courts distinguish “between an act continuous in its
4 character” - as Oberdorfer urges here - “and a case where the
5 statute is aimed at an offense that can be committed [all at
6 once].” *Blockburger v. United States*, 284 U.S. 299, 302, 52 S. Ct.
7 180, 181, 76 L. Ed. 306 (1932) (internal quotation marks, citation
8 omitted); *see Brooks, supra*.

9 Notably, “the Double Jeopardy Clause does not prohibit the
10 imposition of all . . . sanctions that could, in common parlance,
11 be described as punishment. . . . The Clause protects only against
12 the imposition of multiple *criminal* punishments for the same
13 offense, . . . and then only when such occurs in successive
14 proceedings.” *Hudson v. United States*, 522 U.S. 93, 98-99, 118
15 S. Ct. 488, 493, 139 L. Ed. 2d 450 (1997) (internal quotation
16 marks, citations omitted; emphasis in original). Oberdorfer’s
17 reliance on *Hudson* in this case is misplaced. The civil case does
18 not involve any “civil penalty” of the type analyzed by the *Hudson*
19 court; indeed, these two cases do not involve two separate criminal
20 punishments at all. The civil case involves a garden-variety
21 contract claim for WRS’s breach of its lease agreement, and a claim
22 against WRS for the common-law tort of trespass. The civil case
23 arose from WRS’s actions that took place in 2010. In contrast, the
24 present criminal action is based on Oberdorfer’s actions in August
25 and September of 2012 - actions that had not even taken place at
26 the time the Government filed the civil case against WRS. The two
27 cases involve distinctly different facts and law.

1 It is true that in some cases, the Government may act
2 improperly in conducting parallel civil and criminal investiga-
3 tions. "[T]he government may act in bad faith if it brings a civil
4 action solely for the purpose of obtaining evidence in a criminal
5 prosecution and does not advise the defendant of the planned use of
6 evidence in a criminal proceeding." *United States v. Stringer*, 535
7 F.3d 929, 936-37 (9th Cir. 2008) (citing *United States v. Kordel*,
8 397 U.S. 1, 11, 12-13, 90 S. Ct. 763, 767-70, 25 L. Ed. 2d 1
9 (1970)). However, there is no indication here that the Government
10 conducted its investigation of WRS's 2010 construction of the
11 communications tower for the purpose of later filing a criminal
12 action against Oberdorfer. To belabor the point, Oberdorfer's
13 allegedly criminal acts had not even taken place at the time the
14 Government's dispute with WRS arose. Indeed, the Government notes
15 Oberdorfer's actions that form the basis of the criminal case
16 "occurred after 20 plus months of no construction activity and
17 completion of discovery and filing of dispositive motions in the
18 civil action." Dkt. #32, p. 6.

19 Oberdorfer also attempts to draw a distinction between the
20 Government's claims in the civil case and typical trespass cases.
21 At oral argument, Oberdorfer argued that in a typical trespass
22 case, the trespasser has no right to be on the land at all. In
23 contrast, here, Oberdorfer has had a right to be on the property in
24 question for over thirty years. He claims the only real dispute is
25 whether he followed the proper procedures before erecting the new
26 communications tower. He asserts that all he has done is improve
27 the way his business operates by preventing a weaker tower from
28 falling under the weight of the weather. Notably, Judge Simon

1 rejected this argument in ruling on the Government's summary
2 judgment motions in the civil case. He held WRS's "failure to
3 obtain advance approval for its construction [was] not a mere
4 technical mistake." Dkt. #148 in the civil case, p. 12.

5 Oberdorfer continues to argue that what the Government is
6 proposing in the civil case is punitive and not remedial. At oral
7 argument, he advanced the argument that if, in the civil case,
8 Judge Simon orders him to remove the first, inferior tower, that
9 would constitute a "remedy," whereas if he is ordered to take down
10 the new, superior tower, that would be a "punishment." None of the
11 authorities Oberdorfer cites supports such an illogical conclusion.

12 Simply stated, Oberdorfer's argument, though creative, is
13 unpersuasive. As Justice Stevens noted in his concurrence in the
14 *Hudson* judgment, "it would be difficult to find a case raising a
15 double jeopardy claim that would be any easier to decide than this
16 one." *Hudson*, 522 U.S. at 108, 118 S. Ct. at 497 (Stevens, J,
17 concurring). From the straightforward application of well-
18 established double jeopardy principles to the facts of this case,
19 it is clear that the criminal prosecution of Oberdorfer for the
20 actions charged in the Information does not violate the Double
21 Jeopardy Clause.

22 Oberdorfer also advances arguments based on collateral
23 estoppel, *res judicata*, and privity. None of those arguments is
24 even remotely persuasive, and I find it unnecessary to discuss
25 their merits here. While Oberdorfer is clearly in privity with
26 WRS, there is nothing else contained in Oberdorfer's collateral
27 estoppel or *res judicata* discussion which supports dismissal of the
28 Information.

1 In conclusion, Oberdorfer's motion to dismiss the Information
2 on double jeopardy grounds is **denied**.

3 IT IS SO ORDERED.

4 Dated this 24th day of April, 2013.

5 /s/ Dennis J. Hubel

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Dennis James Hubel
Unites States Magistrate Judge